

STATE OF MICHIGAN
COURT OF APPEALS

CLARK HILL, PLC,

Plaintiff-Appellee,

v

TRACY KATZ,

Defendant-Appellant.

UNPUBLISHED

September 22, 2005

No. 261480

Oakland Circuit Court

LC No. 2004-058339-CK

Before: Fitzgerald, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right the February 23, 2005, opinion and order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of plaintiff that was incorporated into a March 9, 2005, judgment awarding plaintiff \$26,684 in this breach of contract action. We affirm.

Defendant entered into a contract on March 10, 1997, with Ada Kerwin, an attorney with plaintiff law firm Clark Hill, for representation in a divorce action. The retainer agreement provided in part:

The NONREFUNDABLE retainer fee is the sum of \$2,050 WHICH IS PAID FOR PURPOSE OF ASSURING MY AVAILABILITY IN YOUR CASE [.] \$550 of this retainer is to be paid immediately upon signing of this Agreement and the remaining \$1,500.00 is due upon termination of my representation or the entry of the Judgment of Divorce whichever occurs first in addition to any additional costs or hourly time due at that time. The hourly rate for my services will be billed at \$200.00. Interim billings will be based upon the time expended by me in your behalf. The final bill, in addition to the time expended, will be based upon the extent to which preparation is required for accomplishment of discovery proceedings, mediation, and/or trial, the degree to which outside expertise, such as accounting, appraisal or other assistance is needed, the skill and experience brought to this case by us, and such other factors as are incorporated in the relevant Canons of Ethics which govern all attorneys practicing in the State of Michigan.

On February 23, 1998, the trial court entered a judgment of divorce that contained a provision for binding arbitration. Following an arbitration hearing on April 23, 1998, the trial court entered an April 27, 1998, order that stated in part:

Plaintiff TRACY L. KATZ'S request for the payment of Attorney Fees is granted. Defendant MICHAEL S. KATZ shall pay Clark Hill, Plaintiff's counsel the sum of Five Thousand Dollars (\$5,000), payable in two equal installments of Two Thousand Five Hundred Dollars (\$2,500) on May 6, 1998 and June 5, 1998. This provision shall be enforceable through the use of the Court's contempt powers.

Michael Katz made three payments on the account, the last of which was made on March 4, 1999. Defendant made no payments on the account.

On May 14, 2004, plaintiff filed the present complaint for breach of contract. Attached to the complaint was an "Affidavit and Statement of Account," which included copies of the monthly billing statements and detailed descriptions of services mailed to defendant.

On July 26, 2004, defendant moved for summary disposition under MCR 2.116(C)(7), asserting that plaintiff's claim to recover sums due under the contract was barred by the six-year statute of limitations set forth in MCL 600.5807. Defendant's affidavit attached to her brief in support of the motion stated in part that, "I have never made a payment of any kind, nor has any payment been made on my behalf, to Clark Hill, relative to the debt which is being claimed."¹

Plaintiff filed a response to defendant's motion, arguing that the March 10, 1999, payment on the account restarted the running of the statute of limitations. Plaintiff contended that defendant authorized and consented to the payment by her request in the divorce action that Michael Katz contribute to her attorney fees. Defendant responded that payment by Michael Katz to plaintiff cannot be imputed to defendant and that she did not consent to the payment. After a hearing on the motion, the trial court held in an August 26, 2004, opinion and order that plaintiff's claim was not barred by the statute of limitations because "Plaintiff filed its Complaint within six years of the March 10, 1999 partial payment made on behalf of Defendant, which was requested, authorized and consented to by Defendant under the April 27, 1998 Order."

Plaintiff thereafter moved for summary disposition pursuant to MCR 2.116(C)(9) and (10). Plaintiff alleged in part:

3. That Defendant has admitted that she entered into an agreement with the plaintiff for professional services relative to a Divorce and that such services were provided.

4. That Defendant has also admitted that she has never paid this debt.

¹ Defendant states in her brief on appeal that "it is not disputed that the last services were performed by Plaintiff CLARK HILL to Defendant KATZ on or about April 27, 1998."

5. That Defendant has not paid to the Plaintiff the money owed.
6. That this Plaintiff's suit is based on a sum certain.
7. That Plaintiff's suit was filed as an account stated.
8. That Defendant's sole defense is based on the Statute of Limitations which is a question of law.
9. That Defendant had expressly authorized another to make partial payment on the account and that payment has tolled the Statute of Limitations.
10. That there is no genuine issue of material fact and Plaintiff is entitled to a Judgment as a matter of law.

In response, defendant asserted that she had no opportunity to review the billings and that there was a genuine issue of fact regarding the amount and propriety of the billings.

Following a hearing on the motion, the trial court issued an opinion and order granting plaintiff's motion for summary disposition pursuant to MCL 2.116(C)(10).² Citing *Yeiter v Knights of St. Casimir Aid Society*, 461 Mich 493, 498; 607 NW2d 68 (2000) and *Wayne Co Social Services Director v Yates*, 261 Mich App 152; 681 NW2d 5 (2004), the trial court concluded that defendant failed to rebut the presumption that the partial payments made pursuant to her request constituted defendant's admission of the debt.

Defendant first argues that the trial court erroneously determined that a request by a litigant for payment of attorney fees by a third party provides a basis for a finding that the debtor consented to the payment and that the payment on the account implies a new promise to pay that restarts the running of the statute of limitations with respect to the debt. We disagree.

In *Yeiter, supra*, the Supreme Court held that partial payments on a debt, "some of which were within the limitation period," constituted a renewal of the promise to pay the amount owed. In *Yeiter*, the debt was a series of loans that the defendant partially repaid. However, when the plaintiff sued for the remainder, the defendant claimed that the statute of limitations barred recovery. In rejecting the defendant's statute of limitations argument, the Court pointed out that some of the payments were made less than six years before the filing of the complaint,³ but were unaccompanied by any declaration or circumstance that would rebut the presumption that they were "an acknowledgment of the full obligation." *Id.* at 500. In discussing the effect of partial payments on the statute of limitations issue, the Court cited *Miner v Lorman*, 56 Mich 212, 216,

² At the hearing on the motion, defendant stated that she would stipulate to entry of a judgment in the amount of \$5,000 – the amount Michael Katz was ordered to pay to plaintiff pursuant to defendant's request for attorney fees in the divorce action.

³ The applicable statute of limitations was MCL 600.5807(8), which relates to contract actions.

22 NW 265 (1885), for the proposition that such payment implies a renewal as of the date of the payment of the promise to pay. More specifically, the Court held:

[A] partial payment restarts the running of the limitation period unless it is accompanied by a declaration or circumstance that rebuts the implication that the debtor by partial payment admits the full obligation. [*Yeiter, supra* at 497.]

This holding is accompanied by a footnote, which states in part:

“Partial payment [on a debt] is equivalent to a new promise, and operates as an acknowledgement of the continued existence of the demand and as a waiver of any right to take advantage by plea of limitations of any such lapse of time as may have occurred previous to the payment being made. [*Id.* at 497-498, n 6.]

Thus, partial payments on a debt can revive the balance of the debt if the payments were unaccompanied by any declaration or circumstance that would rebut the presumption that they were an acknowledgement of the full obligation. *Yeiter, supra*. Defendant contends that because she did not make the payments on the debt, she did not have the opportunity to accompany the payments with a declaration or circumstance to rebut the presumption that the payments were an acknowledgement of the entire debt. But in *Myers v Erwin*, 180 Mich 469; 147 NW 458 (1914), which involved a promissory note to repay a loan, the Court stated:

It is undisputed that the statute of limitations had run against this note, unless it is relieved from the force of said statute by one or more of the last three payments, discussed in the former opinion, and those payments would not stop the statute running in favor of appellant unless he is shown, either by inferential or direct evidence, to have consented to or authorized the same. A new promise will not be implied from a partial payment made by another under such circumstances as will preclude such inference.

The appellant in *Myers* testified in part that he had no knowledge that another party “made any . . . payments on said note subsequent to 1894, and had never, directly or indirectly, authorized or consented to the payments in question.” *Id.* at 472. Although the Court found that conflicting testimony raised issues of fact in the case that were not for the trial court to decide in a jury trial, the Court noted that if the appellant’s statements were true, “the payments in question made by [another party] without appellant’s knowledge or consent would not deprive the latter of claiming the benefit of the statute of limitations . . .” *Id.* at 472-473.

Here, the documentary evidence reveals that plaintiff sent to defendant detailed monthly billing statements for legal services beginning in July 1997. By the time of the arbitration hearing defendant had billed plaintiff for legal services pursuant to the contract in the amount of \$24,929.10. The documentary evidence reveals that defendant requested contribution toward her attorney fees in the divorce action and that the April 27, 1998, order⁴ required Michael Katz to

⁴ The record does not reveal the date on which defendant made a request for contribution toward
(continued...)

pay \$5,000 of defendant's attorney fees directly to defendant's attorney by specified dates.⁵ This direct evidence supports the trial court's factual finding that defendant, by her request for contribution toward her attorney fees, consented to Michael Katz' partial payments and that the March 10, 1999, partial payment by Michael Katz restarted the running of the statute of limitations.^{6 7}

Defendant next argues that even if she consented to the payments by Michael Katz, she did not consent to the full amount of the debt but, rather, only to the amount that Michael Katz was ordered to contribute to the debt. Defendant asserts, without citation to authority, that Michael Katz' notations on his checks to plaintiff – the notation on the second check of “third of five installments,” and the notation on the third check of “Balance - \$1,500 after this payment,” limit the amount of the debt that defendant acknowledged by her consent to the partial payments. But notations by *a third party* who makes payments on a debt do not rebut the implication that the payment was intended by *defendant* to imply a new promise to pay the full debt.

Last, defendant asserts that the trial court erred by granting summary disposition in favor of plaintiff without giving her the opportunity for discovery. But the record reveals that the parties exchanged interrogatories, and there is no indication in the record that defendant ever filed a motion to compel or a motion to extend discovery. Nonetheless, defendant asserts that she was not afforded the opportunity to dispute the reasonableness and amount of the attorney fees. Defendant appears to assume that because this case involves a contract for legal services the trial court should have inquired into the reasonableness of the fees. ⁸But defendant's argument is misplaced, as this action involves a contract for legal services– not a request for attorney fees. Plaintiff presented documentary evidence to establish that there was a contract, that defendant breached the contract, and that plaintiff was damaged by the breach. Defendant did not offer any evidence to establish the existence of a material factual dispute regarding the elements of the claim. The trial court properly granted summary disposition in favor of plaintiff.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly

(...continued)

her attorney fees in the divorce action.

⁵ Even if defendant cannot be charged with consent to payments made after the payment dates specified in the order, the last date for payment specified in the order was June 5, 1998. Utilizing this date, the statute of limitations would expire on June 5, 2004. The complaint in this case was filed on May 14, 2004.

⁶ Whether Michael Katz' payments were voluntarily made is not relevant to the determination of whether defendant consented to the payments.

⁷ Defendant suggests that this holding leaves her at the whim of Michael Katz with regard to when the payments would be made. However, Michael Katz was subject to the contempt powers of the court if the payments were not timely made.

⁸ Indeed, defendant cites cases addressing awards of attorney fees after trial.